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I recommend that this obligatory essay under my supervision,

By Jjemba Freddie

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“SPARE THE ROD AND SPOIL THE CHILD”: AN ASSESSMENT TO DETERMINE THE LEGAL IMPLICATIONS OF THE PROHIBITION OF CORPORAL PUNISHMENT IN ZAMBIAN SCHOOLS.

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Date...23rd December, 2004... Supervisor...*K. Chanda*...

RTD. Judge Kabazo Chanda

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

**“SPARE THE ROD AND SPOIL THE CHILD”: AN ASSESSMENT
TO DETERMINE THE LEGAL IMPLICATIONS OF THE
PROHIBITION OF CORPORAL PUNISHMENT IN ZAMBIAN
SCHOOLS**

By Jjemba Freddie

**A paper submitted to the University of Zambia in partial fulfillment of the
requirements for the award of the Degree of Bachelor of Laws of the University of
Zambia.**

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Dedication

I would like to dedicate this work to My mother Ezerea Nakuya, my wife Rose and children Diana, Joannah and Esther.

ACKNOWLEDGEMENT

I would like to thank Mr. Eugenius Mumba for the assistance he rendered me in accessing resource material, Mr. Moses Muyawala for the same reason.

PREFACE

Most countries in the world regard corporal punishment as cruel in this millennium, yet necessary as a tool of discipline. Zambia is a Christian nation but has partially outlawed corporal punishment. In this research paper, attempt is made to trace the origins of corporal punishment among Christians as it is sanctioned by the Bible, highlighting areas that have abolished it but clamour for its reinstatement, such as Britain.

The paper further discusses various statutes relating to corporal punishment, and the misconception that it refers only to the use of the cane. According to international human rights instruments, there are many forms of inhuman and degrading treatment which ought to be done away with.

Above all, the study reveals that the judicial and legislative ban on corporal punishment, has had very little effect, and continues to be administered in schools in Zambia. This is not due to lack of sensitization, but because parties affected do not know what to do in case of abuse. Worse forms of punishment have surfaced in urban areas, such as 'dig your height'. Parents are reluctant to waste time and meager resources taking teachers to court, when they themselves use corporal punishment in the home.

And so corporal punishment may be erased from the statutes, but remains alive, and where it has died, has resurrected in even more severe transformations.

CHAPTER ONE

1.1 Introduction

Background

Corporal punishment refers to the intentional application of physical pain as a method of changing behaviour. It is a moral inscription sanctioned by the Bible as a form of discipline necessary for life on earth and hereafter. King Solomon in the Book of Proverbs, Chapter 22 Verse 15 noted, "foolishness is tied up with the heart of a boy: the rod of discipline is what will remove it far from him." He goes on in Chapter 23 Verse 13-14: "Do not withhold correction from a child, for if you beat him with a rod, he will not die. You shall beat him with a rod, and deliver his soul from hell".

Zambia, cognizant of this fact, was firmly built on similar Christian principles, as enshrined in Section 20-23 of the Education Act¹, Section 24 (c) and 27 (4) of the Penal Code² and Section 330 of the Criminal Procedure Code (CPC)³. These statutory provisions authorized 'moderate' corporal punishment

¹ Cap 134 of the Laws of Zambia

² Cap 87

³ Cap 88

for disciplinary reasons in institutions dealing with correction of deviant behaviour, where other forms of punishment were inadequate. The Head Teacher was authorized by S.21 (1) of the Education Act, and could also delegate to another teacher. Under S 27 (4) of the Penal Code, a person could be sentenced to corporal punishment in a school, prison, reformatory or by the local courts as well as for prevention of cruelty to animals.

Following the High Court ruling in **John Banda V The People**⁴ and **The People V Ian Kainda**,⁵ corporal punishment was outlawed in Zambia as it violated Article 15 of the Republican Constitution, in that it was inhuman and degrading. Note however that the Canadian Supreme Court refused to strike out Section 43 from the Criminal Code as being unconstitutional.⁶

Consequently, the Minister of Legal Affairs tabled three Bills in July 2003 seeking to amend sections of the subordinate legislations which were inconsistent with the constitution, with a view of abolishing corporal punishment wherever it was administered. The debate in parliament centered on corporal punishment in schools.

⁴ HPA/06/1998

⁵ HLR/01/2000

⁶ Canadian Foundation for Youth and the Law V the Attorney General of Canada, 2001

Hence the research is based on the same perception

With the unanimous passage of the three bills, provisions relating to corporal punishment were repealed. The legislature had finally bowed to pressure, not only from the Judiciary but also from the Human rights activists, who viewed corporal punishment as a form of child abuse⁷. Dr. A. W. Chanda⁸ argues that Zambia had fallen short of implementing provisions of the United Nations Convention on the Rights of the Child (CRC), and until parliament repealed offending provisions, the High Court decision in John Banda would only bind subordinate courts, and not the supreme court. Other High Court Judges could ignore it.

However, public opinion was not in favour of these decisions in so far as they related to schools, for it was felt the cane was necessary for maintenance of discipline⁹. This contradicted sharply with the report by the Parliamentary Select Committee, presented by Mr. L.L. Phiri¹⁰, which purported that stakeholders were in favour of abolition of corporal punishment.

⁷ The Permanent Human Rights Commission, 1990

⁸ Zambia Law Journal Volume 32, 2000 at page 8

⁹ Xinhua News Agency, 28th August, 2003, in the article titled "Most Parents favour corporal punishment in schools.

¹⁰ Chipangali Member of Parliament

It is evident from the views of the select committee and parliamentarians that not enough research was done. The committee threw out the analogy of the United Kingdom (U.K) argument that it was reconsidering bringing back the cane. It is common knowledge now that most people in the U.K view abolition of corporal punishment as retrograde step, responsible for the indiscipline of modern youths.¹¹

Furthermore, only five countries in Africa have banned corporal punishment, namely, Namibia (1991), South Africa (1996), Zimbabwe (1999), Zambia (2000) and Kenya (2001). Why has the rest of the African Union not followed suit?

In Canada, 8 Provinces have banned corporal punishment, while in 5 Provinces it is still legal, unless prohibited by the School Boards¹². In the United States of America, corporal punishment is outlawed in 28 states, while it is legal in the remaining 25.

The rationale for legalizing corporal punishment in those countries is that they have not seen a corresponding benefit arising out of its abolition, apart from the increased violence and gun-trotting in schools.

¹¹ Abolition in parliament was by a majority of just 1 vote in 1987. 92.5 of callers in a telephone poll were in favour of reintroduction of the cane.

¹² Source: Canadian Teachers Federation, Ottawa, Canada, February 2000.

It is against this background that this research paper seeks to determine the effect of judicial and legislative decisions on the Teachers, pupils and parents. The study attempts to :

- (i) determine public opinion on the amended legislations
- (ii) investigate whether the affected parties are aware of the ban, and
- (iii) if they abstain from corporal punishment.
- (iv) Compare Zambia with the rest of the world, so as to establish whether Zambia, a Christian nation was not in a hurry to abolish corporal punishment.

The findings of the study are important to policy makers, as they will be prompted to revisit the Law, and either provide for reasonable chastisement with in the family, and uphold Zambia as a truly Christian nation built on sound moral values, or completely abolish corporal punishment, irrespective of the consequences. The study will also assist parties, including legislators, to clearly identify other forms of punishment that are equally inhuman and degrading, and make provisions for their ban.

The Penal code and the Education Act define Corporal punishment as 'a moderate use of the cane or strap on the

palms or buttocks of the offender¹³. This is a narrow definition, which leaves open a Pandora box of options available to an overzealous teacher in his quest for instant discipline, where he has been denied use of the cane or strap.

Secondly, the Court outlawed corporal punishment in all institutions. The legislature only concentrated on institutions of learning. There is need to amend the Juveniles Act Cap 53, the Local Courts Act Cap 29 and the Prisons Act Cap 97, these being other institutions where corporal punishment is administered.

Thirdly, corporal punishment is not the only form of inhuman and degrading punishment. Some members of Parliament in suggesting alternatives went as far as recommending suspensions and expulsions for the most extreme cases of indiscipline. These are already provided for by the Education Act. But this does not only contravene other international instruments which guarantee a right to education, but poses a social problem, by unleashing indiscipline youths on the streets.

¹³ Section 22

Fourthly, where as in other jurisdictions corporal punishment is outlawed in schools and homes as well, there is no law forbidding parents or guardians from using the cane in Zambia. The home therefore remains a potential breeding ground for violence, even if the school has been cut off the list.

The paper through a comparative analysis with the rest of the world, using international instruments on corporal punishment, provides an in-depth study of repercussions of the prohibition of corporal punishment on Zambia, highlighting whether this is not a half-hearted response, from a human rights point of view, or it is a genuine response to a persistent problem. And of crucial interest is the awareness campaign, and what remedies are available to a victim of corporal punishment.

1.2 Definition of Corporal Punishment

There was not much written work on corporal punishment. Hence the researcher relied on Zambian Statutes and various International Instruments.

The statutory definition of corporal punishment in Zambia is narrow as it is limited to the moderate use of the cane¹⁴. Provisions permitting corporal punishment have been repealed and amended. What was in essence banned was the use of a cane or strap as a form of punishment in all institutions in Zambia¹⁵ because it was inhuman and degrading.

Other jurisdictions have a broader definition of corporal punishment. In the United States of America, it includes a wide variety methods, such as hitting, slapping, spanking, punching, kicking, pinching, shaking, shoving, chocking, use of various objects such as belts, sticks or other painful body postures (such as kneeling or placing in closed spaces), use of electric shock, use of excessive drills or prevention of urine or stool elimination.¹⁶

1.3 GLOBAL EFFORT TO END CORPORAL PUNISHMENT

There has been a global initiative to end corporal punishment championed by the United Nations (UN). And various UN Conventions have made declarations to that effect. They include:

¹⁴ Section 27 (2) and (3) read together with Section 27 (4) and (5) of the Penal Code Cap 87 states that the Court may in its discretion order a person to be caned for non-custodial offences. Section 330 of the Criminal Procedure Code Cap 88 echoes similar sentiments.

Section 28 of the education Act Cap 134 defines corporal punishment as the use of the cane or suitable strap.

¹⁵ Refer to the Court ruling in John Banda V The People and The People V Ian Kainda.

¹⁶ Society for Adolescent Medicine, at pp 1.

(1)THE UN CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

- Article 19 of the (CRC), requires states to take "all appropriate legislative, administration, social and educational measures to protect the child from all forms of physicals or mental violence ... while in the care of parents, legal guardians or any other person who has the care of the child."

- Article 28 of the CRC on the child's right to education "requires States to take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present convention".

- Article 37 of the CRC requires states to ensure that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment¹⁷. Compliance by states is monitored by the Committee on the Rights of the child¹⁸. State parties must submit reports on progress towards implementation of the convention within two years of ratification and thereafter submit every five years. The Committee noted that few countries have clear laws on the question of corporal punishment and goes on to say in its seventh session in November 1994, that "corporal punishment of the children is incompatible with

¹⁷ This is embodied in Article 15 of the Constitution of Zambia.

¹⁸ This is the Treaty body comprising 10 members and meets three times a year in Geneva.

the convention ... and proposed the revision of existing legislation by state parties, as well as increased awareness and educational campaigns to prevent child abuse and the physical punishment of children”.

In its first General Comment adopted in February 2001¹⁹, the committee emphasized inter alia that:

- education must be provided in a way that respects the inherent dignity of the child.
- Education must be provided in the fullest sense of that term.
- Children should be involved in school disciplinary proceedings as a way of promoting learning and realization of rights of the child.

2.THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Implementation of the ICCPR is monitored by the Human Rights Committee, which is competent to receive reports from state parties on implementation of the ban, and make necessary recommendations.

¹⁹ Source: <http://www.endcorporalpunishment.org> dated 29/4/2004 at pp 3

There are various Articles in the ICCPR relating to corporal punishment.

Article 7 for example states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..."

In its General Comment No. 20 adopted in 1992, the Human Rights Committee²⁰ the committee's view of Article 7 was that prohibition must extend to corporal punishment, including excessive chastisement ordered as a punishment for a crime or as an educative or disciplinary measure. The committee noted that Article 7 protects in particular children, pupils and patients in teaching and medical institutions.

3. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS(ECOSOC)

The committee on economic, social and cultural Rights oversees the implementation of this Covenant. Article 13 (1) of the Covenant which guarantees right of every one to education, also states that "education shall be directed to the full development of the human personality and

²⁰ Source: ibid

the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms". Pursuant to this ideal, the committee is alarmed by the persistent legality of school corporal punishment, and recommended prohibition. In its 1999 General Comment, the Committee is the view that

" corporal punishment is inconsistent with the fundamental guiding principles of International Human Rights Law enshrined in the preambles to the Universal Declaration of Human Rights and both Covenants,...and welcomes initiatives taken by some State parties which actively encourage schools to introduce 'positive' non-violent approaches to school discipline"²¹

4.THE CONVENTION AGAINST TORTURE

The Committee Against Torture is responsible for monitoring the implementation of the Convention Against Torture and Other cruel, inhuman or degrading Treatment or Punishment and has condemned corporal punishment²²

²¹ HRI/GEN/ 1 RE.4. page 73. SOURCE: <http://www.endcorporalpunishment.org> dated 29/4/2004

²² UN General Assembly Official Records , Fiftieth Session, A/50/44 1995 paragraph 177 and A/51/44 1996 paragraph 65 (1).

Article 2 (1) of the convention requires state parties "to take effective legislative, administrative, judicial or other measures to prevent acts of torture."

5. CORPORAL PUNISHMENT AND JUVENILE JUSTICE STANDARDS

(i) The Beijing rules:

Rule 17.3 of the United Nations Standard Minimum rules for the Administration of Juvenile Justice (Beijing Rules) states that Juveniles shall not be subject to corporal punishment.

(ii) Rule 67 of the UN rules for the Protection of Juveniles Deprived of their liberty states, "...all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment".

(ii) Riyadh Guidelines

The UN Guidelines for the prevention of Juvenile Delinquency (the Riyadh Guidelines) paragraph 21 (h) states that education systems should devote particular attention to "avoidance of harsh disciplinary measures, particularly corporal punishment"

Paragraph 54 says

"No child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions".

6. THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS (ECSR)

This supervises conformity of the law and practice of member states of the council of Europe with the European social charter. The committee is guided by Article 19 of the UN Convention on the Rights of the child (CRC) and decided cases in the European Court of Human rights, where it was held that "reasonable chastisement" contravened Article 3 of the European convention on Human Rights.

7. THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

Article 11 (5) of the African charter on the Rights and welfare of the child requires state parties to ensure that school or parental discipline is administered with respect for the

inherent dignity of the child²³” State parties are implored to take necessary steps within their constitutional processes to give effect to provisions of the charter.

The Position of Zambia regarding corporal punishment

Corporal punishment is outlawed in Zambia, following amendments to the Penal Code Act Cap 87²⁴, the Criminal Procedure Code Act Cap 88²⁵ and the Education Act Cap 134²⁶ of the laws of Zambia. This was as a result of the courts having struck down sections permitting corporal punishment in these subordinate legislations as being unconstitutional.²⁷ Bills amending offending provisions were unanimously passed by the National Assembly²⁸.

It is important to note that although the Courts were of the view that corporal punishment be outlawed in all its entirety, the effect of the legislative amendments were that this form of punishment was deleted from the statutes in institutions where it had been legalized. Enactment of this legislation entailed

²³ African Charter on the Rights and Welfare of the Child, OAU Doc> Cab/leg/24.9/49 (1990).

²⁴ National Assembly Bill No.12 of 25th July 2003.

²⁵ National Assembly Bill No.11 of 25th July 2003.

²⁶ National Assembly Bill No. 13 of 25th July 2003.

²⁷ Per High Court Judge Elliot Chuulu in John Banda V The People, HPA/06/1998

²⁸ Parliamentary Debates, Friday 8th August 2003.

consequential amendments to other Acts yet to be tabled²⁹.
1973 Regulations of corporal punishment in primary and
secondary schools will be repealed by statutory instruments
following the amendment of the Act.

²⁹ Such as the Supreme Court Act Cap 25, the Local Court act Cap 29, the Juveniles Act Cap 53 and the Prisons Act Cap 97.

CHAPTER TWO

ANALYSIS

2.1 Origins of corporal punishment

Corporal punishment has been culturally sanctioned for a long time³⁰, by legal and religions doctrines. It is only in the last 30 years that there has been a growing out cry for its abolition.

The utilitarian theory³¹ justifies punishment in terms of good consequences, and if harm outweighs good, then punishment is bad. Corporal punishment arose in Europe in the 18th century for four benefits:

1. because it was cheap and more effective. It was preferred to hanging as early as 1870.
2. it acted as a social embarrassment and deterred wrong doers from future wrong doing.
3. as a reformatory tool, whereby offenders ceases to violate the law.

³⁰ Refer to page 1

³¹ traceable to Jeremy Bentham

4. according to Hegel³², punishment annuls wrongdoing by establishing rights of the victim.
5. In legal principle, corporal punishment is derived from English Law of 1770, where it was held that teachers are authority figures who may act in loco parentis and discipline the child, just like the parent, if present.³³
6. Those who advocate for banning corporal punishment insist that it perpetuates child abuse and breeds aggressive violent behaviour. Those against the ban argue that corporal punishment enhances discipline. In countries like the United Kingdom (UK) where corporal punishment has been abolished, there is upswing in indiscipline and violence.

The paper is not discussing the pros and cons of corporal punishment, but the legal implication of its ban in Zambian High Schools.

2.2 Legal basis of corporal punishment: John Banda V the People³⁴

Corporal punishment was outlawed in Zambia following the High Court ruling in the above case in 1999. Corporal punishment was part of the English received Law, and was Lawful until 1964 when

³² Hegel's Theory of Punishment, Problems and perspectives

³³ Conte A.E. In loco parentis, Alive and well, 2000 pages 195-200

³⁴ HPA/6/1999

unconstitutionality arose³⁵ and owes its origin to the Natural School of Jurisprudence which advocates that Laws should uphold morals, which morals are bound up in religion. The state is very much concerned with behaviour of its citizens and can only relax legal restrictions when there is a sufficient degree of self-control bred from moral discipline³⁶. Can we therefore say that this degree of discipline had been attained for the court to outlaw corporal punishment? In most third world countries, corporal punishment is not abolished³⁷, given the social politics and economic backwardness prevalent, not conducive for good behaviour. Even in some developed countries, corporal punishment is still legal. In Canada, it is legal in 5 Provinces unless prohibited by School Boards. In the US, it is legal in 22 states and illegal in 28.³⁸

2.3 Brief facts of John Banda V The People?

The appellant was found by Patrol Police along Mataba Street in Libala Stage 4B about midnight in the company of others. When challenged to stop, they scampered in different directions and the appellant was

³⁵ the Penal code provisions were passed before Independence but with Independence came the Constitution (as the Supreme Law) with a Bill of Rights

³⁶ R. W. Dias, *Jurisprudence*, at page 553

³⁷ only Zambia in 2000, Zimbabwe in 1998, Namibia in 1991 and South Africa 1996, have outlawed Corporal punishment in Africa.

³⁸ Source: <http://www.familyeducation.com> dated 30th April, 2004.

apprehended after a chase. In the process of being arrested, he became violent and broke a rear lens of the Police vehicle. He was sentenced to 10 strokes of a cane for malicious damage to property, pursuant to S 24 (c) and 27 of the penal code. He appealed against this sentence, inter alia, on the following grounds:

1. that the sentence was brutal, inhumane and barbaric, affirmed by the need to be supervised by a medical doctor (S.27(5)) while being meted out.
2. that the sentence conflicted with the appellant's guaranteed and entrenched constitutional right against torture, inhuman and degrading punishment under Article 15 of the Constitution of Zambia.

The High Court set aside the punishment relying on Adam Berejena V The People³⁹ and the Zimbabwean cases of Stephen Ncube V The State, Brown Ishuma V the State and Innocent Ndlhovu V The State⁴⁰. The Law as it stood in *Adam Berejena* was that "Corporal punishment should be imposed very sparingly, and only in the most serious circumstances, such as grave brutality or a serious outbreak of crime; mere prevalence of crime is not enough".

³⁹ 1984 ZR 19

⁴⁰ Zimbabwe Supreme Court Judgement No. SC 156/87 of 6th October and 14th December 1987, reprinted in the Commonwealth Law Bulletin Volume No. 2 April 1988 pages 593-595

In the Zimbabwean cases, whipping of men six strokes for raping girls of tender age was set aside because "it strips the recipient of all dignity and self-respect and is contrary ...to the traditional humanity practiced by almost the whole of the civilised world, being incompatible with the evolving standards of decency".

On the second ground of appeal, the learned judge concurred with the defense counsel that S.24(c) and S27 (2) (3) (4) and (5) of the penal code contravened Article 15⁴¹ of the Constitution, and could not therefore be treated as derogation as the Director of Public Prosecution, (DPP) had argued. The Penal Code provisions relating to corporal punishment were therefore unconstitutional, and should be struck down.

⁴¹ that no person shall be subjected to torture, inhuman or degrading punishment or treatment

2.4 ANALYSIS OF JOHN BANDA V THE PEOPLE.

1. The Canadian Supreme Court⁴² insisted that a similar provision in their penal code (S.43) was a derogation, although it did not justify corporal punishment. S.43 of the Canadian Penal Code provides:

“Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as maybe, who is under his care, if the force does not exceed what is reasonable under the circumstances”.

The learned Judge David McCombs observed that the court could not strike out S.43 because it struck a balance between the interests of the child⁴³ and those of the state⁴⁴, and instead threw the challenge to legislators to offer guidelines in the continuous campaign against corporal punishment. So, the court refused to strike out S.43 of the Penal Code as being unconstitutional.

⁴² Canadian Foundation for Children, Youth and Law V the Attorney General of Canada

⁴³ represented by parents and teachers

⁴⁴ constitutional right to protection against cruel, inhuman and degrading punishment or treatment

The 1973 Zambian Constitution had 'saving clause' for corporal punishment, and Article 17 (now Article 15) provided that:

17 (1) no person shall be subjected to torture or inhuman or degrading punishment or other treatment.

(2) nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the Law in question authorizes the infliction of any description of punishment that was lawful in Zambia immediately before the coming into operation of this constitution.

What this meant was that corporal punishment was lawful under S.24(c) and S.27 of the Penal Code, and was not in direct conflict with the Supreme Law, as the Constitution expressly provided for the derogation. Judge E.E. Chuulu notes in his judgment of John Banda V The People at pg.8 that Parliament had very good intentions for dropping the 'saving clause' in the 1991 and 1996 Constitutions, and it was not for the Court to query the wisdom of the Legislature. [refer to analysis of Parliament Debate on Corporal Punishment on pg 9-11]

2. Neither the learned counsels nor the court delved into the complimentary nature of the positivist and naturalist debate, which inter alia emphasizes that laws should uphold morals for them to stand the test of time.

R.W. Dias⁴⁵ observes that morality is a factor that governs continuity of Laws, according to the Naturalists, while Positivists emphasize that even a 'sick' law is a law nonetheless in so far as it is properly legislated.

Since morality is bound up with religion and religion has okayed corporal punishment, it can be argued that outlawing corporal punishment amounts to killing the law in essence. [ref. to chapter 1].

3. The court took a generic horoscopic view of Corporal Punishment. On one hand the court's view was that it was consistently abused as teachers flouted the statutory moderate standards. No documented evidence was adduced to show that the abuse was on the increase. On the other hand the court did

⁴⁵ Jurisprudence, page 547

not draw a distinction, probably due to lack of judicial precedents, between victims of corporal punishments, that is the young child (below 2 years), the teenagers and adults. Neither was distinction drawn between corporal punishment sanctioned by the court for retributive purposes as in the case of *John Banda*, and as a rehabilitative tool of discipline in the school. These distinctions are vital because corporal punishment serves different ends.

Hitting a child under two years is morally wrong and harmful as the child doesn't understand why he or she is being hit⁴⁶. But for older children, it is seen as a disciplinary tool, which remains essentially evil until it brings about a greater good⁴⁷. It is a misconception that it is generally abused in the schools because the school milieu is an open organization with sufficient public surveillance to minimize abuse⁴⁸

The distinctions above are cardinal, because the legislature could have been misled by a blanket ruling.

⁴⁶ per Justice D. McCombs in *Canadian Youth Foundation for Children, Youth and the Law*

⁴⁷ according to Utilitarians

⁴⁸ *Ingram V Wright*, 430 US 651, 662 (1977)

2.5 CONFLICT BETWEEN THE JUDICIARY AND THE LEGISLATURE

It is not doubted that the subject of corporal punishment was what was in issue. But both the court and the legislature ignored minute details which rendered their debate and conclusions lopsided. The court in outlawing corporal punishment depended on the facts of one convicted of crime, and was silent on corporal punishment in schools and the family. The Parliamentary debate does not dwell on the 'Convict crying foul' for fear of being caned, but is punctuated by rampant abuse⁴⁹ of corporal punishment by teachers in schools. No where in the Parliamentary debates is reference made to convicts being caned, or abused, notwithstanding that the Bills tabled for amendment included the Penal Code Amendment Bill and The Criminal Procedure Code Amendment Bill which authorized convicts to be caned.

⁴⁹ Hon D. Chitala said, "most of us who went to community school suffered a lot at the hands of teachers who used to flog us... the assault on our children must end today". Hon L. Sondashi observed, "in bringing this amendment, our children will be rescued from the brutality of some teachers"
Source: National Assembly Debate for August, 2003

2.6 ANALYSIS OF PARLIAMENTARY DEBATE

The Parliamentary Select Committee⁵⁰ presented its report to the National Assembly after collecting views from stakeholders (the report does not define stakeholders). The report did not receive opposing views and all the MPs supported the bill. In supporting the bill, the committee observed that:

1. Corporal punishment was grossly abused by teachers in schools and this has a negative impact on the learning process, as well as promotion of violence. The report does not mention any positive aspects of corporal punishment, and therefore fails to provide a balance that is vital for making an informed opinion.

⁵⁰ A joint committee on legal affairs, human rights, gender, education, science and technology, chaired by Hon. L.L Phiri.

All teachers interviewed regard corporal punishment as a quick positive disciplinary method, and since its ban, violence of children on the teachers is on the increase⁵¹.

They believe that:

- (a) for a poorly equipped third-world overcrowded school, where the teacher is the center of learning activity, corporal punishment is the only way of instilling instant discipline and preserving academic control.
- (b) There are no proven negative effects⁵² as presented by the Select Committee, asserting that on average, corporal punishment in Zambian schools has been moderate, and a few isolated cases of abuse do not take away the general good.

Mc Combs J. in the Canadian Foundation For Children, Youth and The Law V The Attorney General, 2000 stated,

⁵¹ At least 5 case of Teacher-pupil confrontation are annually reported to the Heads of schools, especially in High Schools.

⁵² Such as bodily harm, fear, physical and mental torture

Secondly, the ban in UK was spearheaded by the Society of Teachers Opposed to Physical Punishment (STOPP), and then Parliament legislated in 1987. Even then, the ban was as a result of majority of one (1) vote.

Thirdly the ban was gradual – it started with public schools and then private schools. In Zambia legislation followed a court decision to outlaw corporal punishment in all institutions.

Fourthly, while in UK most parents do not favour the ban, most parents in Zambia are in favour.

3. That instead of corporal punishment, there were other effective measures such as counseling, detention, suspension from school and expulsion in cases bordering on criminality.

The Committee did not however explain whether those measures are non-existence in the UK, and if they exist, why there was increased indiscipline following the ban. By merely stating these as alternatives as opposed to being complimentary to caning, is not convincing. It is important to show how they can be as effective as corporal punishment.

2.7 CRISIS OF DEFINING CORPORAL PUNISHMENT

The amended and repealed sections of the Penal Code [S.24(c) and S.27] Chapter 87, and S.12 of the Education Act Chapter 134, and S14 and 330 of the Criminal Procedure Code Chapter 88 of the laws of Zambia, define corporal punishment as the use of a light cane or slap on palms or buttocks. As noted earlier, this statutory definition is narrow compared to other jurisdictions. In the US corporal punishment includes hitting, slapping, spanking, punching, pinching, use of objects such as belts and sticks, other painful body postures such as kneeling, excessive drills or prevention of urine or stool elimination⁵⁴.

What was in essence banned was corporal punishment as defined by the Zambian statutes, that is the use of the cane. But caning is not the only inhuman and degrading punishment. It is important that Parliament clears this clouded background, and bring the relevant legislations with in the line with international instruments. Article 37 of the Committee on the Rights of the

⁵⁴ Source: Journal of Adolescent Health, Volume 32 2003, No. 5, at page 385

Child (CRC) and Articles 16 of the Convention Against Torture call upon state parties to take legislative measures to protect persons from torture and other cruel inhuman or degrading Treatment or punishment. In the case of the *Canadian Foundation For Youth and the Law*, Mc Combs J. observes that parliament must issue guidelines as to what constitutes greater uniformity in judicial decisions involving allegations of assault of children”.

The Minister of Legal affairs when tabling the amendments Bills told Parliament that Zambia had ratified the convention Against Torture, inhuman, degrading Treatment or punishment and that this was a move intended to domesticate the convention⁵⁵.

In a nutshell, these International instruments define corporal punishment widely. The lacuna left behind after amending provisions relating to corporal punishment, should be expressly cleared. To bring the amended Education Act and the Penal Code Act in line with the constitution of Zambia, acts amounting to Corporal Punishment or degrading treatment should be listed.

⁵⁵ National Assembly Debate August 2003, at page 237, paragraph 5.

Otherwise an offending party may argue that his actions did not amount to Corporal Punishment as he or she did not use a cane.

2.8 PARENTAL CORPORAL PUNISHMENT

Most International Conventions to which Zambia is a signatory have condemned Corporal Punishment in total, that is in schools, courts, police, prisons and the family.

The Committee on the Rights of the Child which monitors implementation of the CRC has consistently stated that legal and social acceptance of physical punishment of children in the home and institutions, is not compatible with the convention.⁵⁶

In its comments on corporal punishment, the European Committee of Social Rights which supervises conformity of Human Rights Law among member states, observed that in several countries⁵⁷ there is a common law immunity which permits persons in loco parentis to use reasonable and moderate chastisement in the correction of Children. However, this was in

⁵⁶ Source: <http://www.endcorporalpunishment.org> dated 29th April 2004 at page 1.

⁵⁷ Belgium, Poland, Spain, Ireland and France

breach of Article 17 of the European Charter, and the Committee encouraged parties to abolish corporal punishment in the family, so as to comply with the Convention on the Rights of the Child.

In outlawing corporal punishment in Zambia, both the judiciary and legislature are silent on corporal punishment in the family. While Article 4 (c) of the African Charter on the Rights and Welfare of the Child encourages preservation and strengthening of positive African morals, traditional values and cultures, Article 11 (5) of the same cautions the approach adopted, that

“state parties must ensure that school or parental discipline is administered with the inherent dignity of the child”.

The result is that corporal punishment is not completely outlawed in Zambia, and the reason can only be found in the words of Mc Combs J. in the *Canadian Foundation For Children, Youth and the Law* case, where he held that S.43 of the Criminal Code of Canada “put a limited aspect of the family life beyond the reach of Criminal Law, so that teachers and parents use reasonable force in protection of the children and to teach the social values and behavioural limits”.

Parents in Zambia can use 'unlimited force' on their children without incurring criminal liability because the law is silent. However in the case of A.V UK, (100/1997/884 1096) the European court of Human Rights unanimously found that the beating of a young English boy by his step father constituted "inhuman or degrading punishment," in breach of Article 3 of European Human Rights Convention, and that the current UK domestic law failed to provide adequate protection, and he was awarded \$10 000 by the UK government. Prosecution of the step-father in a UK court had failed on the grounds that the punishment was 'reasonable chastisement'.

So where domestic law does not offer adequate protection to the child, or the Law is unconstitutionally vague⁵⁸. The Zambia Government may be held liable under international conventions, as was the case in A V UK.

Secondly, there is need to strike a balance between the interests of the state (security of person or child) and the best interests of the child (guarded by the parent). The parents are under a duty to raise the child as they see fit and probably can do so under

⁵⁸ per Gonthier, J in *R V Nova Scotia Pharmaceutical Society* [1992 2 SCR 606; the law is unconstitutionally vague if it does not provide an intelligible standard or sufficient guidance for legal debate

the current law that seems to legalize corporal punishment in the family. This implies that the state has relinquished its interest in the child at home and can only pick it up in the school. But Mc Combs J⁵⁹ notes that while "extending the reach of criminal law would have a negative impact upon families and hinder parents to nurture their children, abusive physical punishment should be criminalized."

⁵⁹ *Canadian Foundation for Children, Youth and the Law case*

CHAPTER THREE

CONCLUSIONS AND RECOMMENDATIONS

The result of outlawing corporal punishment in Zambian schools has been minimal. The educational campaign against corporal punishment has been left to non-governmental organizations that have not done much to sensitize potential victims. Most pupils interviewed knew about the ban through civics lessons. Most of the parents are aware of the ban, but do not know what to do, because there is no guideline in case of abuse. Most suggested visiting the school authorities and have a chat with a view of stamping out corporal punishment.

All teachers are knowledgeable about the ban following a Ministerial Circular to all Heads of Schools. But inspite of this, many continued to inflict corporal punishment and other forms of inhuman and degrading treatment or punishment, as long as they avoided the cane. The result has been loss of the right to

education and more punitive disciplinary measures, such as 'dig-your height'⁶⁰

The half-hearted approach by parents whose children have suffered corporal punishment does not help much, and is probably a silent approval of corporal punishment which they alone are competent to administer. The teacher may be criminally liable for assault or civilly liable for personal injuries. But parents are aware of the effect of overburdening Courts with suits, which Courts cannot dispose of more serious suits speedily. This would definitely disrupt the learning processes, a stage no parent is willing to reach.

There is also need to determine standard of proof. An unintentional light smack on the shoulder by a mathematics teacher using a meter rule, cannot surely amount to corporal punishment. It is easier to prove a criminal case of assault outside a school environment. It is a fervent desire that corporal punishment cases should never go the courts or risk relegating courts to disciplinary tribunals. The police where bulk of these cases are first reported should be empowered to handle

⁶⁰ punishment where a pupil is given a task of digging a pit whose depth is equivalent to his height.

unmeritorious suits at that level and let the courts handle more serious cases. The Victim Support Unit (VSU) can be enlarged and made mobile to settle such cases on the spot. There is also need to revamp the Juvenile Court. Such were the suggestions of some parents interviewed.

As regards standards of proof, there is need for guidelines as to what conduct on the part of the teacher amounts to violation of the inherent dignity of the child. In the American case of Hall V Tawney,⁶¹ the Federal Supreme court defined violation as ..."intrusion into the realm of personal privacy and bodily security through means so brutal, demeaning and harmful as literary to shock the conscience of a court".

Can the child injured by the parent seek recourse to International Judicial Systems because domestic law offers him or her no protection? This is hampered by

- (i) High costs
- (ii) The requirement that all domestic remedies should have been exhausted.

⁶¹ 621 F 2d 607, 613

In an economic environment which makes payment of tuition fees cumbersome, it is unlikely that a parent would seek International Jurisdictions unless there are very compelling circumstances to do so. Non-government organisations can also take up the case from a humanitarian point of view, as was the case with the Canadian Foundation for Children, Youth and the Law, who challenged constitutionality of S. 43 of the Canadian Penal Code, on behalf of the aggrieved child.

3.1 ALTERNATIVES TO CORPORAL PUNISHMENT

Notwithstanding that the Ministry of Education may issue guidelines to schools, the Parliamentary Select Committee should have made suggestions. In the *Canadian Foundation For Children Youth and the Law*, Mc Combs J. noted, obiter, that in amending S.43, Parliament should provide specific criteria to guide parents, teachers, Law enforcement officers and trial judges, who are vested with the difficult task of deciding sensitive, emotionally charged allegations of criminality against parents and teachers ...

The new approach should:

1. emphasize on positive educational changes between teachers and students, and not futile contentious win-lose contests. Teachers should be cordial and respectful of students.
2. Family-school partnerships involving parents in anti-truancy schemes should be encouraged, but disparity in attendance, has been detected in Zambian schools. In Private schools, compliance in Open-day activities has been 100% while in Public schools it has been 40%
3. 'Binding over – verbal undertaking by offender not to breach, risk of which attracts a fine.⁶²
4. Students and their parents should be involved in decision making on among other issues, disciplinary measures.
5. Schools should have peer groups which encourage good behaviour.

⁶² UK approach. Source: Anne Worall, Punishment in the community, The future of Criminal Justice, 1997

6. Schools should reward appropriate behaviour.
7. Further teacher training and seminars in counseling.
8. Wide policies in teaching and disciplinary methods that de-emphasize the necessity for corporal punishment.

Suspensions and expulsions were least favoured by most parents interviewed, as opposed to suggestions by the Select Committee. In UK, 42% of offenders in Juvenile Courts were those excluded from school, and these increased three-fold between 1991 and 1994

The Ministry of Education should list conduct that amounts to inhuman and degrading punishment or treatment, and erase the controversy left behind by the repealed statutes, which tended to define corporal punishment as the use of the cane.

Such a list should include slapping, spanking, pinching, kicking, shoving, chocking, use of other objects such as belts and sticks, use of painful body postures such as kneeling or placing in a closed space, use of electric shocks, excessive drills such as 'dig your height' and prevention of urine or stool elimination.

Parliament is committed to outlawing corporal punishment in all institutions. Three bills were passed by the National Assembly in August 2003, namely the Education Act, the Penal Code and the Criminal Procedure Code Amendment Bills.

The Parliamentary Select Committee⁶³ appointed on 28th January 2004 on the Prisons Amendment Bill⁶⁴, presented its report to the House on 3rd November, 2004. The joint committee's objectives were among other things, repeal of provisions relating to corporal punishment.⁶⁵

The proposed amendments would enable Zambia comply with the 1957 United Nations Minimum Standard Rules for the Treatment of Prisoners. Section 29 and 30 of the Bill refer to the repealing of sections of the Prisons Act that relate to corporal punishment.

Parliament is commended for the speed at which these legal reforms have been instituted to bring Zambia into the realm of the international community.

⁶³ A joint committee on National Security and Foreign affairs, and Legal Affairs, Governance, Human Rights and Gender matters.

⁶⁴ National Assembly Bill No. 16/2004

⁶⁵ objective 5 (e) of the report. Other objectives include establishment of a healthcare service, establishment of a Parole Commission, extension service programme for discharged prisoners and revision of provisions relating to release of prisoners on parole.

The family however remains a potential breeding ground for violence against children, and parliament should extend its arm to the home. This does not mean taking away the right of parents to raise children in a manner they deem fit. This must be balanced with the State's constitutional right for the protection of children against ill-treatment as enshrined in international agreements that Zambia has ratified. A limited aspect of family life should be placed 'beyond the reach of criminal law, so that the parents may use reasonable force for the protection of the children, and to teach them behavioural limits'.⁶⁶

⁶⁶ Per McCombs J, in the *Canadian Foundation For Children, Youth and the Law*

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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

QUESTIONNAIRE FOR TEACHERS

Kindly answer the following questions by putting a tick in the box[]
provided and explain where necessary.

1. Name of schoolGovernment [] Private []
High School [] Basic []

2. Bio-data
(a) Sex

Male []

Female []

- (b) Age group

21 - 25 []

26 - 30 []

31 - 35 []

36 - 40 []

3. What post do you hold in school?

Head Teacher []

Senior Teacher []

Class Room Teacher []

Others (specify) []

4. What is corporal punishment

.....
.....

5. Is corporal punishment administered in your schools?

Yes [] No []

6. Why do you think teacher resort to corporal punishment?

.....
.....

7. What has been the effect of abolishing corporal punishment on discipline in the school

?.....
.....
.....

8. What other forms of punishment have you instituted in the place of caning?

.....
.....

9. Have you recorded any violent teacher-pupil confrontation since caning was abolished?.....

.....

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

QUESTIONNAIRE FOR PARENTS/GUARDIANS

Kindly answer the following questions by putting a tick in the box [] provided and explain where necessary.

1. Residence

2. Bio-Data

(a) Sex

Male [✓]

Female []

(b) Age groups

21 – 25 years []

26 – 30 years [✓]

31 - 35 years []

36 – 40 years []

41 – 50 years []

3. Religious denomination

Moslem []

Christian [✓]

Other

4. Marital status

Married []

Single [✓]

Divorced []

Widowed []

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

QUESTIONNAIRE FOR PUPILS

Kindly answer the following questions by putting a tick in the box [] provided and explain where necessary.

- LIBRA HIGH SCHOOL
- PRECIOUS
1. Name of school Government [✓] Private []
High School [✓] Basic []
2. Residence ...CHILENGE (NEW PLOTS) HSE NO 2939
3. Bio-Data
- (a) Sex
- Male []
- Female [✓]
- (b) Age
- 7 - 10 []
- 11 - 15 []
- 16 - 20 [✓]
4. Have you been punished lately at school?
- Yes [] No [✓]
5. If 'yes' why were you punished?
-
-
-
6. If 'yes' what type punishment were you given?
-
-
-
7. Who punished you?

The Head []

The class teacher []

The Deputy Head []

The Prefect []

The teacher on duty []

Others specify []

8. If you were caned, did you resist?

Yes []

No []

9. Are you aware that caning is not allowed?

Yes [✓]

No []

10. If your answer is 'yes' who told you that caning is not allowed?

I was told by some teachers at school.....
.....
.....

11. In your opinion, why do you think teachers cane pupils? Teacher of pupils really

12. Is caning the only form of punishment you do not like?

Yes []

No [✓]

13. If your answer is 'No', state other ways teacher punish pupils. Digging of pits, means
your height

14. Has anyone [Head teacher, Deputy Head or teacher] ever talked to you about corporal punishment?

Yes [✓]

No []

15. Suggest types of punishments teachers should give instead of caning.

I think they should be punishing the pupils by
kneeling in front of the administration so that they can

16. What do you understand by corporal punishment?

Corporal punishment is a punishment which results
something bad on someone.....